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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PORTFOLIO RECOVERY ASSOCIATES, LLC, Plaintiff, Cross-defendant and Appellant, v. JUDITH SERRANO, Defendant, Cross-complainant and Respondent.	D073719 (Super. Ct. No. 37-2016-00017796-CU-CL-CTL)

APPEAL from an order of the Superior Court of San Diego County, Kenneth J. Medel, Judge. Affirmed.

Simmonds & Narita and Tomio B. Narita, Jeffrey A. Topor, Jennifer L. Yazdi for Plaintiff, Cross-defendant and Appellant.

Law Offices of Roberto Robledo and Roberto Robledo; Kazerouni Law Group and Matthew Michael Loker for Defendant, Cross-complainant and Respondent.

Portfolio Recovery Associates, LLC (PRA) appeals an order denying its petition to compel arbitration, in which the trial court ruled PRA had waived its right to arbitrate the dispute by engaging in litigation. PRA contends defendant Judith Serrano was not prejudiced by its delay in bringing the petition. It also contends that by finding waiver, the trial court necessarily found the existence of an agreement to arbitrate encompassing Serrano's claims. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2015, PRA purchased Serrano's delinquent credit card account from Serrano's original creditor, Synchrony Bank, formerly GE Capital Retail Bank (collectively Synchrony Bank).

In May 2016, PRA sued Serrano for account stated, and sought to collect on her unpaid credit card balance.

In July 2016, Serrano cross-complained against PRA, alleging individual and class-wide causes of action. PRA answered Serrano's cross-complaint, asserting as an affirmative defense that an arbitration agreement governed their dispute.

In December 2017, PRA moved to compel arbitration, contending "Serrano must arbitrate her claims on an individual basis, as required by the arbitration agreement in the cardholder agreement [she] entered into with . . . Synchrony Bank."[1] PRA relied on the

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1 The cardholder agreement provides: "Please read this section carefully. If you do not reject it, this section will apply to your account, and most disputes between you and us will be subject to individual arbitration. This means that: (1) neither a court nor a jury

cardholder agreement's assignment provision, which states: "We may sell, assign, or transfer any or all of our rights or duties under this Agreement or your account, including our rights to payments." Martha Koehler, Synchrony Bank's manager of litigation support, stated in a declaration: "Synchrony [Bank] sold the Account to [PRA]." Maria Marin, PRA's records custodian, stated in a declaration: "[PRA] purchased from Synchrony Bank all rights and obligations in the Account." Based on the declarations, PRA asserted that "[a]ll rights under the credit card agreement, including the right to arbitrate, were assigned to PRA, which now stands in the shoes of Synchrony [Bank]."

Serrano opposed the petition, arguing PRA was not a party to the cardholder agreement, which stated: "This is an Agreement between you and GE Capital Retail Bank[,]" and the accountholder (Serrano) may be referred to as "you" or "your," and GE Capital Retail Bank as "we," "us," or "our." Serrano further argued that despite her discovery request, PRA had failed to produce the assignment agreement between it and Synchrony Bank.[2] Serrano contended PRA had waived its right to arbitrate by its inconsistent conduct, which prejudiced her. Serrano specifically argued that as early as

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will resolve any such dispute; (2) you will not be able to participate in a class action or similar proceeding; (3) less information will be available; and (4) appeal rights will be limited." (Emphasis and some capitalization omitted.) The agreement further provides: "1. If either you or we make a demand for arbitration, you and we must arbitrate any dispute or claim between you . . . and us . . . . 2. We will not require you to arbitrate . . . a case we file to collect money you owe us. However, if you respond to the collection lawsuit by claiming any wrongdoing, we may require you to arbitrate."

2 Serrano requested "all documents relating to [Serrano's] account with the original creditor on whose behalf [PRA] was attempting to collect . . . ." PRA responded, "Plaintiff has produced all of the documents in its possession, custody, or control that are responsive to this request." (Some capitalization omitted.)

September 2016, PRA in its answer to the cross-complaint asserted as an affirmative defense its right to compel arbitration; nevertheless, it waited until December 2017 to bring this petition.

Relying on her counsel's declaration, Serrano argued, "the fact that PRA chose to file its claim in [the trial court], requested this [c]ourt resolve a discovery waiver issue, provided Serrano with discovery responses and materials, provided two separate sets of amendments to those responses, stipulated and requested that this [c]ourt issue a protective order, engaged Serrano's counsel in several meet and confers regarding discovery issues, provided Serrano with settlement offers on her individual claims, attended case management conferences, hearings, and participated in the scheduling order, evidences that, under the totality of the circumstances, PRA has acted inconsistently with the arbitration right."

Serrano further argued she "sent PRA substantial discovery requests in the form of form interrogatories, special interrogatories, requests for admission, and inspection demands. . . . PRA failed to timely respond to [her] discovery requests and sought assistance from the court for relief from waiver of its discovery objections, which the court granted. . . . While granting PRA relief, the Court also ordered PRA to amend its responses to Serrano's discovery requests, which PRA did with a first set of amendments. . . . PRA served a second set of amended responses to the same set of discovery requests . . . almost a month after PRA e[-]mailed Serrano's counsel inquiring whether Serrano would stipulate to arbitration." (Some capitalization omitted.) Serrano pointed out that

PRA's delay in bringing this petition was due, in part, to its attempts to transfer this matter to federal district court, where it was engaged in multi-district litigation.

In describing the prejudice she suffered, Serrano stated: "PRA's discovery responses have been a point of contention between the parties. So much so that the [c]ourt intervened on two separate occasions, first in PRA's motion for relief from waiver, and second at the request of Serrano's counsel during the most recent case management conference [when] the [c]ourt ordered PRA to comply with the discovery it had promised to provide to Serrano. . . . Behind the scenes, Serrano's counsel has held numerous and lengthy meet and confers with PRA's counsel in an effort to obtain meaningful forthright responses from PRA. . . . Serrano has gone so far as to provide PRA with a 22-page letter detailing every demand that PRA has failed to adequately answer. . . . That letter was followed by lengthy conference calls where Serrano's counsel explained why Serrano was requesting the information in each of the requests." Serrano concluded she was prejudiced because through numerous meet and confers with PRA's counsel, PRA had gained "information about Serrano's position on facts and evidence it would not have had access to had the matter been in arbitration."

In reply, PRA submitted another declaration by Marin in which she stated: "PRA acquired all right, title and interest in a credit card account between Synchrony Bank and [Serrano], including all rights relating to the credit card agreement governing that account." PRA also attached a copy of a "bill of sale" that stated: "[Synchrony Bank] hereby transfers, sells, conveys, grants, and delivers to [PRA], its successors and assigns, without recourse except as set forth in the [Receivables Purchase Agreement], to the

extent of its ownership, the Receivables as set forth in the Notification Files . . . and as further described in the [Receivables Purchase] Agreement."

During a hearing on the court's tentative ruling, PRA's counsel argued Serrano had failed to show prejudice. The court disagreed: "So . . . you get invested in a lawsuit, you move along, you do discovery, you rely on the court procedures and for a significant amount of time, like a year and a half, you are working toward a result. I really think that prejudice is built in and highly implied in that situation for any party. And for it to be upset this late in the game, the court finds there is prejudice involved."

PRA's counsel told the court during that hearing: "Presumably the court has determined there is a binding valid arbitration agreement and that Ms. Serrano's claim falls within the scope of that given a finding that—" The court interjected, "I don't think we found that. I don't think we did find it. . . . [¶] . . . We actually looked at the [case management conference] report and saw that your report requested a jury trial and your report asked that you get involved in discovery, identified depositions that you wanted to take, and a year and a half later now you want to go to arbitration."

The court denied the petition without addressing Serrano's claim that PRA had failed to acquire the right to compel arbitration. It instead found PRA had waived arbitration "based on the litigation that has taken place to this point in this case."

DISCUSSION

"California law favors arbitrations as a relatively quick and cost-effective means to resolve disputes." (*Burton v. Cruise* (2010) 190 Cal.App.4th 939, 944 (*Burton*).) Under Code of Civil Procedure section 1281.2, a court will grant a petition to compel

contractual arbitration if the court "determines that an agreement to arbitrate the controversy exists." The statute establishes an exception, however, where the court determines the petitioner has waived the right to arbitration. (Code Civ. Proc., § 1281.2, subd. (a).) Waiver claims receive "close judicial scrutiny," and the "party seeking to establish a waiver bears a heavy burden" with all ambiguities decided in favor of supporting the arbitration agreement. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195 (*St. Agnes*).)

In *St. Agnes*, the California Supreme Court established a multi-factor test for evaluating whether a party has waived a contractual right to arbitration. (*St. Agnes, supra,* 31 Cal.4th at p. 1196.) Of these factors, the following are pertinent to this appeal: (1) Did the party requesting arbitration act inconsistently with the right to arbitrate or otherwise substantially invoke the litigation process? (2) Were the parties well into the preparation of a lawsuit before the party seeking arbitration notified the opposing party of an intent to arbitrate? (3) Was the arbitration request close to the trial date or delayed for a long period of time before seeking a stay? (4) Has the delay affected, misled, or prejudiced the opposing party? (*Ibid.*)

Under the *St. Agnes* test, each case must be examined in context and no one factor predominates. (*St. Agnes, supra*, 31 Cal.4th at p. 1195.) Nonetheless, in any particular case, a single factor may be determinative. For example, "a party's unreasonable delay in demanding or seeking arbitration, in and of itself, may constitute a waiver of a right to arbitrate." (*Burton, supra,* 190 Cal.App.4th at p. 945, citing *Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19.) "When no time limit for demanding

arbitration is specified, a party must still demand arbitration within a reasonable time. [Citation.] . . . '[W]hat constitutes a reasonable time is a question of fact, depending upon the situation of the parties, the nature of the transaction, and the facts of the particular case.' " (*Wagner,* at p. 30.) Furthermore, a party cannot pursue "courtroom litigation only to turn towards the arbitral forum at the last minute, thereby frustrating the goal of arbitration as a speedy and relatively inexpensive means of dispute resolution." (*Burton,* at p. 945.)

" '[W]hether litigation results in prejudice to the party opposing arbitration is critical in waiver determinations.' [Citation.] ' " 'The moving party's mere participation in litigation is not enough [to support a finding of waiver]; the party who seeks to establish waiver must show that some prejudice has resulted from the other party's delay in seeking arbitration.' " ' " (*Gloster v. Sonic Auto., Inc.* (2014) 226 Cal.App.4th 438, 448.) Moreover, "Prejudice typically is found only where the petitioning party's conduct has [(1)] substantially undermined" the " ' "public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution," ' "or (2) "substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration." (*St. Agnes, supra,* 31 Cal.4th at p. 1204.) Although "courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses" (*id*. at p. 1203), litigation costs are a factor which courts may consider in assessing prejudice (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 995). "[T]he critical factor in demonstrating prejudice is whether the party opposing arbitration has been substantially deprived of the advantages of arbitration as a ' " 'speedy and

relatively inexpensive' " ' means of dispute resolution." (*Burton, supra,* 190 Cal.App.4th 939, 948.)

On appeal, the issue of whether a party has waived the right to arbitration is a factual question we review for substantial evidence. (*Burton, supra,* 190 Cal.App.4th at p. 947.) We affirm the trial court's determination if it is supported by substantial evidence. (*Adolph v. Coastal Auto Sales, Inc.* (2010) 184 Cal.App.4th 1443, 1449-1450.) We " 'presume the court found every fact and drew every permissible inference necessary to support its judgment, and defer to its determination of credibility of the witnesses and the weight of the evidence.' " (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.) An appellate court will reverse a trial court's finding of waiver (1) only if "the record as a matter of law compels finding nonwaiver" (*Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211), or (2) stated another way, if only one inference may reasonably be drawn from undisputed facts (*St. Agnes, supra,* 31 Cal.4th at p. 1196).

As the party seeking arbitration, PRA "had the responsibility to 'timely seek relief either to compel arbitration or dispose of the lawsuit, before the parties and the court . . . wasted valuable resources on ordinary litigation.' " (*Sobremonte v. Superior Court, supra,* 61 Cal.App.4th at pp. 993-994.) " '[A] party who does not demand arbitration within a reasonable time is deemed to have waived the right to arbitration.' " (*Id.* at p. 992.) PRA delayed approximately 18 months after filing its complaint before it petitioned to compel arbitration. During that delay, it participated in discovery, which Serrano detailed in her attorney's declaration. Among other discovery, Serrano

propounded special interrogatories, obtained the court's ruling to compel PRA to produce certain documents, and participated in several meetings with opposing counsel regarding transferring this case to federal court. The court even had to become involved to resolve the parties' discovery disputes. Because of the discovery, PRA managed to learn of Serrano's strategy for defending herself in this litigation. We conclude Serrano made an adequate showing that she was prejudiced as she was deprived of the advantages of arbitration, including a speedy and inexpensive resolution of this matter. Therefore, this sufficed to support a finding of waiver.

This conclusion is bolstered by caselaw finding prejudice in instances involving much less time between the filing of a complaint and the petition to compel arbitration. (*Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 556 [less than four-month delay; sufficient evidence of prejudice during delay period of less than four months where defendant answered and responded to discovery, participated in deposition proceedings, and filed unsuccessful stay motion]; *Adolph v. Coastal Auto Sales, Inc., supra,* 184 Cal.App.4th at pp. 1451-1452 [sufficient evidence of prejudice during six-month delay in demanding arbitration where defendant filed two demurrers, accepted and challenged discovery requests, attempted to schedule discovery requests, and failed to assert arbitration in case management statement]; *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 446, 452 [sufficient evidence of prejudice during six-month delay where defendant filed three demurrers and two motions to strike, forced plaintiff to file discovery motions or lose right to discovery due to statutory deadline; *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 Cal.App.3d. 1220, 1228-1229 [five and

one-half month delay; and sufficient prejudice shown by the plaintiff's participation in settlement negotiations, and it obtained information as to the defendant's legal strategies through defendant's answer to the complaint].)

PRA argues that because it was not the one that propounded discovery on Serrano, she did not have to spend time responding to its discovery. That distinction is immaterial here because what matters is PRA's response to the discovery. PRA "never once suggested that discovery should be barred because this dispute had to be arbitrated." (*Guess?, Inc. v. Superior Court, supra,* 79 Cal. App.4th, at p. 558.) By continuing to engage in the discovery process, PRA acted in a manner inconsistent with its present claim of a right to arbitrate. As the California Supreme Court said in *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778 when rejecting such gamesmanship: " 'The courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create [its] own unique structure combining litigation and arbitration.' " (*Id.* at p. 784.)

Lastly, we reject PRA's claim that the trial court, by finding PRA waived its right to arbitrate, necessarily found the existence of an agreement to arbitrate encompassing Serrano's claims against PRA. That claim is unsupported by the record, as the court specifically declined to reach that conclusion. The court's ruling never mentioned the arbitration clause, much less did it attempt to explain its scope. The court simply concluded that PRA had waived whatever arbitration rights, if any, by engaging in sufficient litigation. We decline PRA's invitation to read anything further into the court's ruling.

DISPOSITION

The order is affirmed. Each party is to bear its own costs on appeal.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.